

The African continent and the special situation/vulnerability principle in the climate change regime

Introduction

Although the impact of climate change is global, these consequences are not evenly distributed. The Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment Working Group II Report makes it clear that Africa is one of the continents most vulnerable to the effects of climate change.¹ During the twentieth century alone, the African continent has seen an average warming of 0,5 degrees.² Climate variability and change will have a significant effect on the following: access to and demand for water, the agricultural sector, the use of energy, the health sector, coastal zones, tourism, settlements and infrastructure, as well as aquatic and terrestrial ecosystems.³ The African continent is, however, not responsible for this dire situation. The African contribution to climate change is negligible. African states contributed a meagre 3,6 per cent of global greenhouse gas emissions by 2000 and the *per capita* contributions from most African states are also minute.⁴

The non-binding⁵ Copenhagen Accord⁶ recognises the vulnerability of Africa as a geographical region since it reads that

⁹⁵‘The African Peer Review Mechanism: A compilation of studies of the process in nine African countries’ a July 2012 report of the African Governance Monitoring and Advocacy Project (AfriMAP) available at <http://www.afriMAP.org/librarySearchDisplay.php> (accessed 4 April 2012) 8.

*LLB (Unilag) LLM, LLD (UP) Senior Lecturer, College of Law, University of South Africa.

¹IPCC Fourth Assessment Working Group II Report Chapter 4 available at http://www.ipcc.ch/publications_and_data/ar4/wg2/en/contents.html.

²Hulme *et al* ‘Global warming and African climate change: A reassessment’ in Low (ed) *Climate change and Africa* (2005) 30.

³IPCC Fourth Assessment Working Group II Report n 1 above at 444.

Africa Environment Outlook 2 Our Environment Our Wealth (2006) 59.

⁵Due to objections by a group of states (led by Sudan, Venezuela and Bolivia), COP 15 was unable to adopt the accord. Instead the COP took ‘note’ of it. See for a discussion Rajamani ‘The making and unmaking of the Copenhagen Accord’ (2010) 59/3 *ICLQ* 824 843.

⁶Decision 2/CP 15 in ‘Report of the Conference of Parties on its fifteenth session held in Copenhagen from 7 to 19 December 2009’ Addendum Part Two: Action taken by the Conference of the Parties at its fifteenth session FCCC/CP/2009/11/Add 1 (30 Mar 2010) 4 (hereafter The Copenhagen Accord) available at <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf>.

enhanced action and international cooperation on adaptation is urgently required to ensure the implementation of the Convention by enabling and supporting the implementation of adaptation actions aimed at reducing vulnerability and building resilience in developing countries, especially in those that are particularly vulnerable, especially least developed countries, small island developing States and Africa.⁷

Accordingly funding for adaptation 'will be prioritized for the most vulnerable developing countries, such as the least developed countries, small island developing States and Africa'.⁸ The Cancun Agreements subsequently affirmed the designation of Africa as one of the vulnerable entities.⁹ It is interesting to note that the 'Durban Platform for Enhanced Action'¹⁰ made no mention of the special status of Africa.

The primary purpose of this note is to critically discuss the legal consequences of the designation of the African continent as vulnerable in the context of the international climate change regime. Thus, the first part of the discussion will investigate the special situation/vulnerability principle in international environmental law and in the climate change regime in particular. The second part will discuss the special situation/vulnerability principle in the context of differential treatment and the Common but Differentiated Responsibilities Principle (CBDR). Thirdly, the legal implications of the designation will receive attention. The discussion concludes with critical remarks.

Special situation/vulnerability in international environmental law

The recognition of Africa's vulnerability is in accordance with Principle 6 of the Rio Declaration of 1992, which states that 'the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority'. Article 3(2) of the 1992 United Frameworks Convention on Climate Change includes the principle that 'specific needs and special circumstances of developing countries, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country

⁷Paragraph 3.

⁸Paragraph 8.

⁹Paragraph 95 of Decision 1/CP.16 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long term Cooperative Action under the Convention' FCCC/CP/2010/7/Add.1 (15 Mar 2011) (hereafter The Cancun Agreements (LCA)) available at <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf> and the Preamble of Decision 1/CMP.6 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session' FCCC/KP/CMP/2010/12/Add.1 (15 Mar 2011).

¹⁰Draft decision /CP.17 Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action 2011, advance unedited version available at http://unfccc.int/file/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform.pdf (10 Mar 2011).

Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration'.¹¹ Thus, article 3(2) contains two categories which may overlap. It refers to special needs and circumstances especially of the most vulnerable, and secondly refers to parties that are encumbered in a disproportionate manner. The principle is firstly concerned with environmental vulnerability and secondly with commitments under the Convention that may encumber developing states in an abnormal or disproportionate manner. The latter category may include response measures undertaken by developed states under the UNFCCC, which may have an impact on the economies of developing states. Article 3(2) thus has a broader application than Principle 6 of the Rio Declaration.

Accordingly, developed countries shall assist vulnerable states in meeting their adaptation costs.¹² Article 4(8) embodies the commitment by all parties to the UNFCCC to give special consideration to necessary actions to meet the specific needs and concerns of developing country parties and reiterates nine categories of vulnerable states.¹³ The categories in article 4(8) are non-exhaustive as this list is prefaced by the word 'especially'. Article 4(9) furthermore requires parties to take 'full account of the special needs and situations of least developed countries' with regard to funding and technology transfer. The current list of least developed countries (LDCs) as designated by the UN Economic and Social Council (ECOSOC) includes thirty-three Africa countries.¹⁴

Article 4(10) includes a provision whereby parties in their assessment and review of the Convention's implementation, shall also take into consideration the situation of parties with economies that are vulnerable to the adverse effects of climate change response measures. This provision differs from the vulnerability envisaged in Principle 6. The vulnerability referred to in article 4(10) addresses economies that are dependent on the 'production, processing and export, and/or consumption of fossil fuels and associated energy-intensive products and/or the use of fossil fuels for which such Parties have serious difficulties in switching to alternatives'. Article 4(10) accordingly caters for African states, such as Nigeria.

¹¹Article 3 contains the principles of the UNFCCC.

¹²Article 4(4).

¹³The following categories are included: 'small island countries; countries with low lying coastal areas, countries with arid and semi arid areas, forested areas and areas liable to forest decay; countries with areas prone to natural disasters; countries with areas liable to drought and desertification; countries with areas of high urban atmospheric pollution; countries with areas with fragile ecosystems, including mountainous ecosystems; Countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy intensive products; and land locked and transit countries'.

¹⁴<http://www.unesco.org/ldc/list.htm>.

The Kyoto Protocol of 1997 also affirms the UNFCCC obligation of Annex I parties to minimise the effects of their responses to combat climate change on developing country parties, especially the most vulnerable and LDCs.¹⁵

Differential treatment and the CDBRRC principle

The principle in article 3(2) is an example of a provision that gives effect to differential treatment¹⁶ in international environmental law in that it may be viewed as an instance where the principle of sovereign equality is sidelined to accommodate extraneous factors;¹⁷ in this case, vulnerability to the impacts of climate change on the African continent and the disproportionate manner in which it is encumbered. The vulnerability of the African continent is particularly due to its inability to implement adaptation measures. This inability is influenced, *inter alia*, by financial, technological and capacity shortcomings. The principle, however, also takes cognisance of the absence of culpability in relation to the burden that certain African states need to shoulder. These factors constitute the core content of the common but differentiated responsibilities principle (CBDR), which confirms the common responsibility of states for the protection of the global environment and recognises the differential state contributions to environmental degradation, as well as their respective capacities in determining their levels of responsibility.¹⁸ The CBDR principle occupies a central role in the international climate change regime.¹⁹ Article 3(1) partially reflects Principle 7 of the Rio Declaration, which confirms that, '[i]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.' In accordance with the common but differentiated responsibility principle,

¹⁵ Articles 2(3), 3(14), 10 (g) and 11(1).

¹⁶ Rajamani *Differential treatment in international environmental law* (2006).

¹⁷ Cullet 'Differential treatment in international law: Towards a new paradigm of inter state relations' (1999) 10 *European Journal of International Law* 551.

¹⁸ Scholtz 'Different countries: One environment: A critical southern discourse on the common but differentiated responsibilities principle' (2008) 33 *SAYIL* 113–136. See, however, International Law Association 'International Committee on Legal Aspects of Sustainable Development, Report of the Sixty Sixth Conference' (1995) 116, and Kellersmann *Die gemeinsame, aber differenzierte Verantwortlichkeit von Industriestaaten und Entwicklungsländern für den Schutz der globalen Umwelt* (2000) 335.

¹⁹ Article 3(1) of the UNFCCC reads 'The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof'.

African states incurred no emission reduction targets in terms of the Kyoto Protocol.²⁰ It is clear that the principles in article 3(1) and 3(2) overlap in the sense that both make provision for differential treatment. However, a certain distinction does exist. Article 3(1) established the common but differentiated responsibilities and respective capabilities principle (CBDRRC) as the *leitmotif* for the climate change regime and developed states therefore have a leading role to play in combatting climate change. This leading role is provided for in the commitments of the parties in article 4, as well as the obligations under the Kyoto Protocol, which do not encumber developing states with emission reduction commitments. Article 3(1) does not explicitly refer to the culpability of developed states, but focuses on respective capabilities. The responsibility element may, however, be deduced from the fact that article 3 reflects several of the important Rio principles – including principle 7. Article 3(2), on the other hand, focuses on two factual instances that require differentiation in relation to developing countries that deserve special consideration. The one instance is the specific needs and special circumstances of vulnerable developing states that should be given full consideration, and the other is the developing states that have to bear a disproportionate or abnormal burden. The vulnerability of a state is a factual issue that does not *per se* directly invoke culpability. However, the second instance, which refers to a disproportionate or abnormal burden, may import the issue of responsibility since it refers to the burden that a developing state must carry, which is not equal to its responsibility for GHG emissions. If one interprets this provision in the light of Principle 6, it is clear that the aforementioned categories of developing countries are accorded a position of priority when the CBDRRC principle is applied or interpreted. In this sense the special circumstances/vulnerability principle operates in conjunction with the CDRCC principle. It ensures that the operation of the CDRCC principle gives even further recognition to the special situation and vulnerability of designated groups. As such the principle in article 3(2) may be viewed as complementary to the CBDRRC principle.

The legal consequences for the African continent

What is therefore the legal significance of the principle in article 3(2) of the UNFCCC and the special designation in the Copenhagen Accord and Cancun Agreements? The nature of principles in general may be clarified in relation to the distinction between rules and principles. According to Dworkin the distinction

²⁰Article 3(1) obliges parties included in Annex I of the UNFCCC (developed countries) to ensure, individually or jointly, that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases included in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B with a view to reducing their overall emissions of such gases by at least 5% below 1990 levels in the commitment period 2008–2012.

between rules and principles lies in the fact that rules apply in an all-or-nothing fashion while principles do not.²¹ Principles have a certain 'weight' and conflicting principles must be weighed and balanced against one another. Conflicting principles could accordingly have legal validity as some may have more weight than others. This is not the case with rules in that in the face of conflicting rules only one can prevail. Thus, in international environmental law, principles have a normative quality and guide states in future rule-negotiations and also inform the interpretation and application of existing rules.²² Principles, therefore, have legal consequences, but they do not prescribe a specific state's behaviour and rather aim to influence the decision-making of states.²³ According to Boyle

the principles found in Article 3 are arguably the most important 'law' in the whole agreement because they prescribe how the regime for regulating climate change is to be developed ... At the very least, Article 3 is relevant to the interpretation and implementation of the Convention as well as creating expectations concerning matters which must be taken into account in good faith in the negotiation of further instruments.²⁴

This is in accordance with the Vienna Convention on the Law of Treaties, which provides for a duty to perform a treaty in good faith²⁵ and requires that treaties be interpreted in good faith.²⁶ The principle of taking the specific needs and special circumstances of the vulnerable and disproportionately or abnormally burdened states into account, is therefore of great importance for the current and future international climate change regime and is reflected in the commitments embodied in article 4 of the UNFCCC and the Kyoto Protocol.

The fact that Africa as a geographical entity has been designated through the Cancun Agreements, ensures that no doubt exists that the continent falls under Principle 3(2). This COP decision contributes to the normative development of the international climate change regime and further fleshes out the principle and ancillary commitments under articles 3 and 4.²⁷ It must be borne in mind that African states may have also been accommodated by the other categories in article 4(8), but the special designation through the Cancun Agreements accentuates the plight of the continent as a single entity with special circumstances and needs which need to be recognised. This designation accordingly takes cognisance of the scientific evidence on the vulnerability of the African continent. The principle in article 3(2), therefore, also makes provision for further differentiation among developing states.

²¹Dworkin *Taking rights seriously* (1977) 22 ff.

²²Beyerlin and Marauhn *International environmental law* (2011) 37.

²³*Ibid.*

²⁴Boyle 'Some reflections on the relationship of treaties and soft law' (1999) 48/4 *ICLQ* 908.

²⁵Article 26.

²⁶Article 31(1).

²⁷See art 7 of the UNFCCC.

Article 4 of the UNFCCC provides for commitments for Annex I parties in order to address the vulnerability of developing states. This entails assistance in relation to adaptation costs.²⁸ Furthermore, parties ‘shall give full consideration’ to the actions that are necessary, which includes measures related to ‘funding, insurance and the transfer of technology’.²⁹ It is interesting to note that the language used in article 4(4) (‘shall also assist’) in relation to countries particularly vulnerable to the adverse impacts, is stronger than in article 4(8) (‘shall give full consideration’), which also relates to countries affected by the impact of response measures. Thus, it seems that the interests of the environmentally vulnerable in meeting adaptation costs receive priority. This line of thinking is affirmed by article 4(10), which refers to the phrase ‘take into consideration’ pertaining to developing country parties that have economies which are vulnerable to response measures.

Thus, articles 3(2), 4(8) and (9) of the UNFCCC read with the Cancun Agreements do not provide Africa with a substantive right to demand funding, insurance and technology transfer. Rather, they create a guiding framework for further negotiations as well as expectations on the part of African states.³⁰

The question arises whether or not the designation of Africa as a vulnerable region is of any use as African states can be grouped either under the category in article 4(9) of the UNFCCC (LDCs), or under the categories in sub article 8. Furthermore, the recognition of the vulnerability of the continent in the IPCC Reports may be used to affirm their special position under article 4(4). It must be borne in mind that the African continent does not consist of states with identical circumstances and needs.³¹ The continent is, for instance, host to oil-producing states that fear the detrimental economic consequences of climate change response measures. Sub-Saharan states are exposed to desertification because of climate change, while coastal states are concerned about shrinking coastlines and diminishing marine resources. However, the common ground for African states is their vulnerability, their absence of responsibility for the problem, and their lack of capacity to address the problem. This is recognised by the geographical designation of the Copenhagen Accord and the Cancun Agreements. This ensures that the African continent as a single entity will be given focused priority in the interpretation and implementation of the UNFCCC, Kyoto Protocol, and COP decisions, as well as future climate change negotiations.³² This is also the case with

²⁸Article 4(4).

²⁹Article 4(8).

³⁰Yamin and Depledge *The international climate change regime: A guide to rules, institutions and procedures* (2004) 227.

³¹Scholtz ‘The promotion of regional environmental security and Africa’s common position on climate change’ (2010) 10/1 *African Human Rights LJ* 7.

³²*Cf* for the legal status of COP decisions, Rayamani ‘From Berlin to Bali and beyond: Killing Kyoto softly?’ (2008) 57/4 *ICLQ* 914 ff.

the special position of LDCs and small island developing states (SIDs). Subsequent COP decisions have affirmed the priority of these groups among developing states.³³ Furthermore, the designation of Africa provides a point of departure for the separation of the consideration of the urgency of African adaptation from the broader adaptation or response measures under article 4(8), reminiscent of the way in which the consideration of LDC adaptation has been separated under the COP agenda, especially since COP 5.³⁴

Concluding remarks

The principle in article 3(2) and the subsequent COP decision ensures that the operation of the CDDRRC principle will ensure further beneficial differentiation among developing states in relation to the negotiation, interpretation and implementation of the international climate change regime. This principle therefore adds an extra layer to differentiation, which is to the benefit of the African continent. It is a principle, therefore, which operates in conjunction with the CDDRRC principle in the context of differential treatment. As such the principle does not have a life of its own. It cannot be separated from the CDDRRC principle.

It is especially important for the African continent to pursue adaptation during international climate change negotiations. The recognition of Africa's vulnerability in a COP decision strengthens the position of the Conference of African Heads of State and Government on Climate Change (CAHOSCC). The latter entity, which is responsible for Africa's negotiations on climate change, may represent the continent based on a prioritised preferential position which is entrenched in the normative framework of the international climate change regime.

*Werner Scholtz**

North West University, Potchefstroom

³³For instance, the parties agreed on a special work programme for LDCs at COP 7 5/CP 7, Implementation of art 4, pars 8 and 9 of the Convention 32 COP 12 adopted a programme of work on impacts, vulnerability and climate change aimed at LCDs and SIDs. 'Report of the Subsidiary Body for Scientific and Technological Advice' on its 25th session held at Nairobi from 6 to 14 November 2006' FCCC/SBSTA/2006/11 (1 Feb 2007) pars 11 to 71 available at <http://unfccc.int/resource/docs/2006/sbsta/eng/11.pdf>.

³⁴*Cf* for an authoritative commentary on the move to organise the COP agenda in accordance with the separate consideration of LDC adaptation needs, Yamin and Depledge n 44 above at 230.

*Professor of Law: North West University, Potchefstroom, South Africa. Project: Regional African Law and Human Security (RALHUS) <http://www.ralhus.co.za>. Research Associate: South African Institute for Advanced Constitutional, Public, Human Rights and International Law.